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EXPERT OPINION AS TO INSURANCE RISK.

I. GENERAL PRINCIPLE. Whether expert testimony by professional insurance men is receivable to throw light upon the effect of a given circumstance in forming a material risk or in causing an "increase of risk," has been the subject of a controversy more than a hundred years old, —a controversy mainly due to the failure to distinguish the different issues which may in this or that case be involved, and impossible to settle until a clear appreciation of this difference of issues is gained. The general question, whether a given circumstance has increased a risk, either represents or is closely connected with at least four distinct issues, for each of which the problem of the Opinion rule's application must receive an independent solution. (1) The question may be whether an insurance broker has fulfilled that duty to his principal (the insured) which requires him to provide by new policies or new clauses against any change of "risk" (*i. e.* of circumstances possibly affecting the property's status with reference to existing policies) brought to his notice. (2) The question may be, in an action for the value of property confiscated, whether the owner of property near to a new public servitude, *e. g.* a railroad, has been injured by it with reference to (*a*) an actual increased danger from fire, or (*b*) an increased expense necessarily imposed upon him for insurance, whether or not the danger

has in fact increased. (3) The question may be, in an action by an insured against the insurers, whether there existed at making the contract a circumstance affecting the "risk," or whether there has since been an "increase of risk," which risk or increase, by not having been communicated according to the terms of the policy, has forfeited the policy. These different issues we may examine in order.

(1) *Insurance broker's duty.* The solution here can best be illustrated by the following case:

> 1833, Chapman *v.* Walton, 10 Bing. 57; an insurance broker received a letter from the insured, announcing the alteration of the voyage in certain respects, and was told to "do the needful" with it; he procured certain alterations in the policies, but the ship was lost at a place not covered by the altered policies, and the broker was sued for breach of duty; Tindal, C. J.: "The point to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience therein, would or would not have come to the same conclusion as the defendant. * * * It is not a simple abstract question, as is supposed by the plaintiff, what the words of the letter mean. It is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances. * * * This conclusion, it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence; because they would not have the experience upon which a judgment could be formed."

This result is entirely satisfactory. The case is the ordinary one of the propriety of professional conduct, and it is obvious that skilled aid must be employed to explain to the tribunal the situation as it would be understood and dealt with by a person of ordinary skill in the profession. Thus, incidentally, the question may arise whether a particular circumstance, *e. g.*, the stopping at a specific port not mentioned in the original policy, would *by possibility so affect the attitude of the insurer* that the broker as a prudent agent ought to cover it by a new clause.

(2) *Injury to property by eminent-domain process.* Here we assume that by the substantive law the owner may include in his bill of damages (*a*) an actual increased danger from

fire, or (*b*) an increased expense necessarily imposed for insurance, irrespective of actual increase of danger. As to the employment of expert testimony on the first point, the question is the same as one to be taken up under the next head (3) (*a*), and it is enough to refer to what is said there. As to its employment on the second point, there can be no doubt of its propriety. The issue is, Can the owner get insurance at the same rates as before? and insurance experts are certainly capable of helping the jury to determine whether he can or cannot.

(3) *Uncommunicated "increase of risk" or concealment of "material facts," as forfeiting a policy.* (*a*) Here let us first assume that the issue is whether there has been an *actual* (or objectively real) increase of danger by the subsequent circumstance, or whether the pre-existing and concealed circumstance was actually (or, in objective reality) "material," *i. e.*, made the fire-danger greater than it would have been. On this assumption, it is a fairly disputable question whether any expert testimony is needed to aid the jury. Certainly, on some points they clearly do not need it.

> 1853, Hills *v.* Ins. Co., 2 Mich. 479; the fact of pending litigation was not disclosed, and the opinion of underwriters was offered to show it to be material, inasmuch as "the insured might be tempted to fire his property, or in case of accidental fire. be less disposed to make exertions to put it out, or less vigilant to insure against fire"; Wing, P. J.: "This is not a question of science or skill; * * * it is a mere deduction of reason from a fact, founded upon the common experience of mankind that a man may be tempted to do wrong when placed in circumstances where his cupidity may be excited. A jury does not need evidence to convince them that this may be the effect."

It seems clear, from this point of view, that the use of expert testimony may or may not be necessary according to the nature of the circumstance at issue in each case. There should be a liberal leaning towards the use of such aid whenever it is by possibility useful; but at any rate, there can be no hard-and-fast rule against it. This doctrine is well set forth in the following opinion:

> 1853, Ranney, J., in Protection Ins. Co. *v.* Harmer, 2 Oh. St. 457:
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> "The application of the doctrine to cases of insurance is as obvious and easy as to any other. A fact concealed or not communicated is claimed to have been material to the risk assumed; because

from its probable or necessary results, it increased the chances of loss. The question is, did it so increase them? If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided. * * * In cases of life and marine insurance, such [expert] testimony may often become indispensable. * * * In cases of fire insurance, it is more difficult to see when a necessity for such evidence could ever arise. But I am not prepared to say that it might not, and if it did, no doubt it should be governed by the same principles. It is therefore impossible to say that the opinions of witnesses are never to be received in determining the materiality of facts not disclosed; much less can it be said that they are to be received in all cases. In each case it must depend on the nature of the inquiry. * * * There was nothing in the question raised here [whether the fact of a suspected incendiary fire, shortly before, was material] requiring either science or skill to determine. The effect that a previous fire might have upon the safety of the building thereafter could be as well understood by one man as another. Every man of sense would know that it would depend entirely upon the cause of the fire."

1896, Taft, J., in Penn M. L. Ins. Co. *v.* M. S. B. & T. Co. (C. C. A.) 72 Fed. 428, 430: "If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of everyday life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. * * * Certainly, there is the same ground for excluding the individual opinions of insurance men [in life insurance] upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not experts upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the

probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind."

(*b*) But is the above assumption of (*a*) correct? Is it true, in the words of the judge first quoted, that "the question is, Did the fact concealed or not communicated, from its probable or necessary results, increase the chances of loss?" Are we investigating the objective reality of an increase of danger, or is our true purpose of inquiry something quite different? The latter, it seems clear. The inquiry before the court in such a case is, in truth, Is the circumstance in question one which would have caused the insurer (or promisor) to fix a higher rate of premium? In other words, not the objective reality of an increase of danger is involved, but the relations which the circumstance in question subjectively bears to the insurer's settled classified terms of charge. When the policy is agreed to be void "if any material fact or circumstance has not been fairly represented * * *, or if, without the assent of the Company, the situation or circumstances affecting the risk shall be so altered as to cause an increase of such risks," the proviso is inserted with reference to the course which the insurer would have taken, had he in view of those facts been entering anew upon the contract, *i. e.*, with reference to his either increasing the premium or refusing the insurance altogether, as induced by the circumstance in question. Thus the word "risk" does not mean "actual danger," but "danger as determined by the insurer's classification of the various circumstances affecting the rate of premium." Our main inquiry, then, is as to the insurer's schedule of classified "risks" (*i. e.*, combinations of circumstances); and as we may desire further evidence than his own word for it, we may examine, secondarily, the usage of insurers in the same community, because their custom will tend to show that the individual insurer's practice is, as conforming presumably to the local methods. We do not look at the usage as simply incorporated into the contract,[1] but merely as throwing light on the probable practice of an individual of the class.

[1] And whether the insured knew of the usage is thus immaterial.

Thus we are in no way concerned with the question of an actual increase of danger. Perhaps it might be clear that the circumstance in the case in hand did not really increase the danger; but if nevertheless it fell within a class of circumstances scheduled by the insurer (for whatever reason seems best to him) as increasing the danger, it would "increase the risk" under the terms of the contract. A proper mode of obtaining aid, then, as to the insurer's practice in the matter, is to call in persons skilled in the insurance business, who may appropriately add to the jury's information on this subject.[1] The form of question proper to be put would be: "Would you as a professional insurer, and according to local practice, regard this concealed or misrepresented circumstance as material?," or, "With reference to local practice, would this circumstance be regarded as increasing the risk?" or, "as calling for a higher rate?" or, "as bound to be communicated?" or, to the promisor himself or his agents, "Would you according to your practice or rules have charged a higher rate of premium in view of this circumstance?"

This is the view accepted by a few courts only. The following passages illustrate it:

1839, Joy, C. B., in Quin *v.* Assurance Co., Jones & Car. (Ir.) 331: "Now what is the test of materiality? It is this: whether the misrepresentation was such as to induce the insurers, either to insure when they would not have done so if they had known that the premises were so circumstanced as they actually were, or to have required a higher premium. If either were the consequence of misdescription, it was necessarily material."

1853, Black, C. J., in Hartman *v.* Ins. Co., 21 Pa. 477: "I think none of the cases go so far as to say that one who knows the practice, not only of the particular office, but of insurance offices generally, may

[1]The truth is that the above principle is necessarily implied in the theory of "material representation" now accepted for the substantive law in construing insurance contracts, "Materiality" means that which would subjectively affect the insurer's attitude towards the proposed contract; thus the point of view is always subjectively the insurer's state of mind. Compare the following exposition of "materiality" by Tindal, C. J., in Elton *v.* Larkins (1832), *post:* "A material concealment is a concealment of facts which *if communicated to the party who underwrites would induce him* either to refuse the insurance altogether or not to effect it, except at a larger premium than the ordinary premium"; which only needs to be qualified by the statement of Blackburn, J., in Ionides *v.* Pender, *post*, that the insurer's attitude must be "the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act."

not give his opinion of the influence which a given fact would have had as an element in the contract.

1854, Curtis, J., in Hawes *v.* Ins. Co., 2 Curt., 230: "True, it is but an opinion; and so is nearly all evidence of value. If you inquire of a sugar broker, whether the existence of a certain quality in sugar—as, for instance, dryness—affects the value of the article in the market, you do but get his opinion or judgment that the existence of that fact has an influence with purchasers generally in determining the price. * * Yet such and similar evidence is constantly admitted. Here the inquiry is in substance whether the market price of insurance is affected by particular facts."

1896, Taft, J., in Penn M. L. Ins. Co. *v.* M. S. B. & T. Co. (C. C. A.), 72 Fed. 428: "Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact."

(*c*) A qualification of this result may sometimes be necessary. It may be asked, since the sense of words used in a contract must be the ordinary and natural one (as being presumably the one common to both), and not a peculiar sense put forward by one party alone, why can the insurer claim that his own standard of classification shall be adopted, as above? Because the whole transaction presupposes that he has his various charges appropriate to various "risks," and the liberty to raise his premium or decline the insurance entirely must be naturally understood by the insured as dependent on the insurer's established classes of circumstances and "risks"; so that the insurer's sense of the phrase is adopted into the contract. But (and here the qualification comes) it may clearly appear in a given case that the phrase was *not* used with reference to the

insurer's sense or classification, and that it is to be interpreted according to the sense used by the insured, *i. e.*, the ordinary sense of "increase of risk," which therefore is to be applied by the jury acting on the standards and knowledge of the average layman. If the case is of this sort, it would seem that expert testimony might, on occasion only, be resorted to (as in (*a*) *supra*), where the nature of the matter called for it.[1] But how shall we determine whether the case is of this sort? Is it necessary that the policy should expressly speak of an increase of risk "to the knowledge of the insured"? Or is it enough that the insured did not know of the insurer's classification? or that it was not set out in the policy? And when the proviso "to the knowledge of the insured" is expressed, does this mean a knowledge of what he considers a risk, or a knowledge of the risks as classified by the insurer? For, if the latter is meant, then if the schedule is shown to the insured or accepted by him, expert testimony could be resorted to, and if not shown nor accepted, expert testimony could not be resorted to. These are queries which have seldom been answered by the courts, but they may well arise; and the following case illustrates one method of solution:

> 1882, Franklin Fire Ins. Co. *v.* Gruver, 100 Pa. 273; the court properly distinguished (as in (*b*) *supra*), between expert testimony as to the increase of actual danger, and expert testimony of the customary higher rates, accepting the latter only; but the clause read "or if the risk shall be increased * * * within the knowledge of the assured," and the court pointed out that "the knowledge of the plaintiff was thus made a material factor in this condition; therefore, proof by experts that, from a technical point of view, the risk [or rate of insurance[2]] was increased, came to nothing unless accompanied by

[1] The argument might be made, to be sure, that the test would be purely subjective as to the insured; *i.e.* "Was the risk, *as the insured supposed*, increased?", and hence expert testimony would never be appropriate. This, however, would only be sound where the policy speaks (as it sometimes does) of an "increase of risk with the knowledge of the insured." When it does not, "increase of risk" would be an objective fact, as to which expert testimony might be needed. Where the "knowledge of the insured" is expressly taken as the standard, it would seem that a foolish owner might ignorantly endanger his property with impunity; or that one who, for example, allowed his workmen to thaw out dynamite over a stove might show that he had never known that this was a dangerous proceeding.

[2] As appears from a previous sentence.

proof that the assured knew that the erections complained of created hazards for which by the rules of insurance an additional rate would be charged. But of this he knew nothing. He did not even know the class in which he was insured. * * It does, therefore, seem to me that without some proof by the company that the plaintiff had some notice or knowledge of the rules of insurance, its expert evidence would come to nothing."

II. STATE OF THE LAW IN THE VARIOUS JURISDICTIONS. As the courts have not always borne in mind the various possible distinctions above discussed, it is not easy to determine the exact state of the law. The rulings may now be examined in the order of the above topics.

(1) *Insurance broker's duty.* There seems to be little authority on the specific point; the view above set forth would probably prevail,[1] and harmonizes with the general doctrine as to expert testimony of professional skill.

(2) *Injury to property by eminent-domain process.* Here, also, there is little authority; the rulings should be considered in the light of the distinctions noted above.[2]

(3) *Forfeiture of policy for "material" misrepresentation or uncommunicated "increase of risk."* Here a difficulty in stating the law arises from the failure of many courts to exhibit the principle on which they have decided. They have either admitted or rejected the expert testimony; but that has in itself no significance; everything depends, or ought to depend, upon the principle applied. With reference, then, to the exposition under (3) in the preceding section, we find the greater number of courts proceeding without any notice of theory (*b*) and therefore apparently upon the assumption of theory (*a*); when the question is asked whether a representation was "material" to the risk or whether there was an "increase of risk," one group of

[1] 1833, Chapman *v.* Walton, 10 Bing. 57, quoted *ante*, p. 68. The following case seems distinguishable; 1900, Hill *v.* Amer. Surety Co. (Wis.) 81 N. W. 1024 (whether the witness company would have insured property in the hands of an assignee, excluded, on the issue whether the assignee was derelict in not procuring insurance).

[2] 1889, Pingery *v.* R. Co. 78 Ia. 442 (whether the proximity of a railroad depreciated the value by increasing the risk of fire; expert testimony held receivable as to increase of risk, but not as to increase of insurance rates); 1840, Webber *v.* Eastern R. Co. 2 Metc. 149 (whether proximity of a railroad would increase a fire risk; admitted).

judges has believed in admitting expert testimony as a rule[1], another group has believed in excluding it as a rule,[2] and a third group has chosen the preferable and proper course of letting the result depend upon the case in hand.[3] Moreover, when the question is in the form, "whether the usage of underwriters or of the insurer was to charge higher rates for such risks," it would on this theory equally be excluded,[4] certainly by courts excluding the former question (as to the individual expert's opinion);[5] and

[1] The question being here whether the *misrepresentation was material:* 1828, Lindeman *v.* Desborough 8 B. & C. 587, *semble* (life); 1830, Rickards *v.* Murdock 10 *id.* 527, *semble* (marine); and the other English cases cited in n. 1, p. 77, *infra;* 1876, Leitch *v.* Ins. Co. 66 N. Y. 107 (marine); 1806, Moses *v.* Ins. Co. 1 Wash. C. C. 388 (marine); 1809, Marshall *v.* Ins. Co. 2 *id.* 358 (marine); and the question being here whether the *risk was increased.* 1866, Schmidt *v.* Ins. Co. 41 Ill. 299, *semble* (fire); 1884, German-Amer. Ins. Co. *v.* Steiger 109 *id.* 254, 258, 259 (fire); 1896, Traders' Ins. Co. *v.* Catlin, *id.* 45 N. E. 255; 1864, Mitchell *v.* Ins. Co. 32 Ia. 424, *semble* (fire; but in Stennett *v.* Ins. Co. (1886), 68 Ia. 675, the question is regarded as open); 1886 Planters' Mut. Ins. Co. *v.* Rowland 66 Md. 244, *semble* (fire); 1833, Lapham *v.* Atlas Ins. Co. 24 Pick. 3, 7 (marine); 1853, Daniels *v.* Ins. Co. 12 Cush. 420, 430 (fire); 1867, Kern *v.* Ins. Co. 40 Mo. 21, 26 (fire); 1854, Schenck *v.* Ins. Co. 24 N. J. L. 451 (fire).

[2] The question here being whether the misrepresentation was material 1766, Carter *v.* Boehm, 3 Burr. 1914, 1918, Lord Mansfield (marine); 1816, Durrell *v.* Bederley, Holt N. P., 284, Gibbs, C. J. (marine); 1863, Rawls *v.* Ins. Co., 27 N. Y. 293 (life); 1873, Higbie *v.* Ins. Co., 53 *id.* 604 (life); 1885, Schwarzbach *v.* Protective Union, 25 W. Va. 622, 651 (fire), and the question here being whether the risk was increased: 1858, Joyce *v.* Ins. Co., 45 Me. 168 (fire); 1871, Cannel *v.* Ins. Co., 59 *id.* 591; 1880, Thayer *v.* Ins. Co., 70 *id.* 539; 1882, Kirby *v.* Ins. Co., 9 Lea 142 (fire).

[3] Not all of the following cases lay down so broad a rule; most of them exclude expert testimony as to whether leaving a building vacant increases the risk; but they also imply or declare that upon other matters such testimony would be receivable: 1856, Mulry *v.* Ins. Co., 5 Gray 545 (whether failure to occupy a building increased the fire risk, a matter said in this instance to be one of common knowledge); 1867, Lyman *v.* Ins. Co., 14 All. 335 (similar); 1853, Hills *v.* Ins. Co., 2 Mich. 479 (fire); 1831, Jefferson Ins. Co. *v.* Cotheal 7 Wend., 77 (fire); 1878, Cornish *v.* Ins. Co., 74 N. Y. 297 (fire); 1853, Protection Ins. Co. *v.* Harmer, 2 Ohio St. 457 (fire); 1876, Milwaukee R. Co. *v.* Kellogg, 94 U. S. 472, *semble* (fire); 1896, Penn. M. L. Ins. Co. *v.* M. S. B. & T. Co. C. C. A. 72 Fed. 413 (see citation *post*).

[4] 1884, German American Ins. Co. *v.* Steiger, 109 Ill. 254, 258, 259 (custom of insurers, excluded); 1876, Ins. Co. *v.* Eshelman, 30 Oh. St. 655 (whether the company would have insured if the disease had been disclosed, excluded); 1885, Schwarzbach *v.* Protective Union, 25 W. Va., 622, 651; 1894, Commercial Bank *v.* Ins. Co., 87 Wis. 297, 303 (action on an adjustment-promise; insurer not allowed to testify that he would not have made the adjustment if he had known of the alteration of account books).

[5] Durrell *v.* Bederley, Schwarzbach *v.* Protection Union, Joyce *v.* Ins. Co., Connell *v.* Ins. Co., Rawls *v.* Ins. Co., *supra.*

equally (one would suppose) by courts allowing the former question, because here the usage is offered merely as hearsay opinion evidence.[1]

A few courts, however, adopt the correct theory, (*b*) *supra;* the result of which is that the question, "Was there in your opinion an increase of risk?" should properly not be asked,[2] because the actual state of danger is immaterial, and therefore the witness' own estimate of it is immaterial; while insurance experts may of course be called to speak as to the usage of the trade or of the insurer in charging higher rates for such circumstances.[3]

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[1] And yet we find some of these courts admitting it; this seems an inconsistency; if the usage, etc., is to be admitted, it can only be on theory (*b*); yet in the following decisions both sorts of testimony are admitted: 1791, Chauraud *v.* Angerstein, Peake N. P. 44, Lord Kenyon, C. J. (marine); 1804, Haywood *v.* Rogers, 4 East 592 (marine); 1817, Berthon *v.* Loughman, 2 Stark. 258, Holroyd, J. (marine) (but in these English cases it does not appear clearly that the courts were proceeding on this theory; and if they did not, then the rulings belong under note 3, *infra*); and the following American cases cited *ante*, n. 1, p. 76; Mitchell *v.* Ins. Co., Planters' Mut. Ins. Co. *v.* Rowland, Kern *v.* Ins. Co., Moses *v.* Ins. Co., Marshall *v.* Ins. Co. The following early case does not indicate its principle: 1672, Pickering *v.* Barkley, Vin. Abr., "Evidence," P. b. 11, vol. XII, 175 (to prove that pirates were within the excepted risk of "perils of the sea," "the master of the Trinity-house and other sufficient merchants" were called in).

[2] 1817, Berthon *v.* Loughman, 2 Stark. 258 (marine); 1839, Quin *v.* Ins. Co. *infra*, *loc. cit.* 336 (fire); 1870, Luce *v.* Ins. Co. *infra* (apparently settling the prior conflict in Massachusetts rulings); 1893, First Congreg. Church *v.* Ins. Co. *infra;* 1854, Hawes *v.* Ins. Co. *infra* (marine); 1896, Penn. M. L. Ins. Co. *v.* M. S. B. & T. Co. *infra* (life).

[3] 1832, Elton *v.* Larkins, 5 C. & P. 385; 1839, Quin *v.* Ass. Co. Jones & Car. 332 (fire; this case, decided by a majority, is an arsenal of arguments, and its opinions, too long for quotation, will repay special study; it should be regarded as the leading case on the subject; 1874, Ionides *v.* Pender, L. R. 9 Q. B. 535, 539 (marine); 1834, Fiske *v.* Ins. Co. 15 Pick. 312, 319 (marine) *semble;* 1838, Merriam *v.* Ins. Co. 21 *id.* 163 (*semble*, in its logical consequence); 1872, Luce *v.* Ins. Co. 105 Mass. 302 (fire); S. C. 110 *id.* 363; 1893, First Congreg. Church *v.* Ins. Co. 158 *id.* 475, 481 (fire); 1853, Hartman *v.* Ins. Co. 21 Pa. 477 (life); 1882, Franklin Fire Ins. Co. *v.* Gruver, 100 *id.* 273 (fire); 1892, Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 263, *semble* (fire); 1828, M'Lanahan *v.* Ins. Co. 1 Pet. 188, Story, J. (marine); 1854, Hawes *v.* Ins. Co. 2 Curt. 230 (marine); 1896, Penn. M. L. Ins. Co. *v.* Mechanics' S. B. & T. Co. (C. C. A.) 72 Fed. 413 (life insurance; whether the existence of other insurance and the commission of embezzlements were material; expert opinion excluded as to the actual increase of risk involved in the fact, unless it is a matter of "scientific knowledge or peculiar skill," but admitted to show the usage of life insurance companies generally in rejecting an application based upon such a fact, since the interpretation depends on what the usage is; in the case of other kinds of insurance, usage as to charging a higher rate may also be asked for; the opinion contains the fullest citation of authorities).

Finally, of the courts accepting this view, we occasionally find one paying attention to the modification (*c*) above pointed out;[1] and the sort of clause thus dealt with is so common in such policies that there is here ample room for a further development and systematization of the principle.[2]

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[1] 1882, Franklin Fire Ins. Co. *v.* Gruver 100 Pa. 273 (fire; see quotation *supra*); probably also 1853, Hobby *v.* Dana, 17 Barb. 111 (fire); 1892, Loomis *v.* Ins. Co. 81 Wis. 366 (fire).

The distinction made by Mr. Justice Gray, in Luce *v.* Ins. Co., *supra*. must here be adverted to. He confines the testimony to the usage of underwriters, and rightly enough, so far as this excludes the opinion of individual underwriter-witnesses, because we may infer from the general usage the insurer's usage, though not from an individual's practice. But he also excludes the practice of the insurer himself, because it is a practice not known to the insured. This seems incorrect. In the first place the trade-usage is no better known to the insured, who is an outsider, and thus the learned judge's principle is inconsistently applied. In the next place, the insured's actual knowledge is immaterial, as explained *supra*, unless it is a special proviso of the contract, in which case it may be shown without resorting to trade usage.

[2] The following cases do not affect the points above dealt with: The ruling in Astor *v.* Ins. Co. (1827) 7 Cow. 217, as to the rates of insurance in other offices, has other bearings. In Brink *v.* Ins. Co. (1877) 49 Vt. 445, 459, it was properly ruled that one who has seen the premises may speak as to the nature of the danger. In Liverpool Ins. Co. *v.* McGuire (1876) 52 Miss. 232, the evidence as to increase of risk was rejected because immaterial under the circumstances. In the following case testimony as to the defendant's custom was wrongly rejected as varying the terms of the policy (a reason not applicable); Summers *v.* Ins. Co. (1848) 13 La. An. 505 (life of a slave). For a case turning on a peculiar state of facts, see Martin *v.* Ins. Co. (1880) 42 N. J. L. 47.